NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 26 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROGELIO HERNANDEZ, a/k/a Regelio Crow, Roger Hernandez and Roy Hernandez,

Defendant - Appellant.

No. 04-50513

D.C. No. CR-04-00071-JVS

MEMORANDUM[*]

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted August 1, 2005
Pasadena, California

Before: **CANBY**, **KOZINSKI** and **RAWLINSON**, Circuit Judges.

The district court found that it was ambiguous whether the officer asked or ordered defendant to return to his truck. Thus, the government did not carry its burden of proving that defendant returned to his truck voluntarily. See Florida v.

[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Royer, 460 U.S. 491, 497 (1983) ("[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given . . . ."). Defendant was therefore seized when he went back to his truck.

In United States v. Williams, slip op. at 10,763 (9th Cir. Aug. 16, 2005), we held that "a passenger's compliance with an officer's command to get back into the car in which the passenger had just exited is not an unreasonable seizure under the Fourth Amendment." Id. at 10,766. Williams, however, concerned a passenger in a car that the officer "had already . . . lawfully stopped with him inside." Id. at 10,770. Williams adopted the rationale of other circuits which have held that "officers may detain passengers during a traffic stop." Id. at 10,769. The passenger there had thus already been lawfully detained and the order to return to the car implicated "the public interest in officer safety." Id. at 10,768. Williams stands for the unremarkable proposition that an individual who has been lawfully detained may be subjected to a degree of inconvenience in order to avoid risk of harm to the officer. Id. at 10,770 (citing Terry v. Ohio, 392 U.S. 1, 17 (1968)).

Here, by contrast, the officer had an insufficient basis for a Terry stop. At that moment, the officer knew only that defendant was parked late at night at a gas station in a high crime area, and that he exited his truck nervously when the officer

shined a spotlight in his car. Considered together, these specific, articulable facts did not provide the basis for reasonable suspicion that defendant was involved in criminal activity. See United States v. Colin, 314 F.3d 439, 442 (9th Cir. 2002). Thus, the seizure was illegal, and any evidence obtained as a result of the seizure must be suppressed. Id. at 446–47.

REVERSED.